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No. 03-349

Supreme Court, U.S.
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In The
# Supreme Court of the United States

JACK THWEATT,
on behalf of himself and all others similarly situated,

*Petitioner,*

v.

ELECTRONIC DATA SYSTEMS CORPORATION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITIONER'S REPLY MEMORANDUM

*Of counsel*:

PATRICK J. BALLARD
BALLARD LAW OFFICES
205 Twentieth Street North
Suite 629
Birmingham, Alabama
35203
Telephone (205) 321-9600

EDWARD L. SCOTT
409 Southeast Fort King
Street
Ocala, Florida 34471

SCOTT CHARLTON
CLARK, CHARLTON &
MARTINO, P.A.
3407 West Kennedy
Boulevard
Tampa, Florida 33623

JOHN G. CRABTREE
*Counsel of Record*

JOHN G. CRABTREE, P.A.
240 Crandon Boulevard
Suite 279
Key Biscayne, Florida 33149
Telephone (305) 423-4350

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## I. THIS CASE PRESENTS AN OUTSTANDING VEHICLE FOR RESOLVING THE CIRCUIT SPLIT.

EDS tries to shoehorn this case into *Adams v. Florida Power*, 255 F.3d 1322 (CA11 2001), *cert. dismissed as improvidently granted*, 535 U.S. 228 (2002), claiming that the petitioner has failed to identify a specific employment practice causing the disparate impact he alleges. (Indeed, most of EDS's response is lifted directly from Florida Power's certiorari response in the *Adams* case.) But unlike the bottom-line challenge in *Adams*—in which the petitioners simply challenged the statistical end result of a reduction-in-force—the petitioner in this case has challenged EDS's ranking *process*, which the company used as part of a reduction-in-force. And the petitioner has identified the precise components within that process that caused it to be wholly arbitrary. Pet., pp. 9-11.

## II. THE CONFLICT IN THE CIRCUITS IS NOT GOING AWAY.

As EDS correctly observes, "[a]fter *Hazen Paper* [*Co. v. Biggins*, 507 U.S. 604 (1993)], three circuits — the Second, the Eighth and the Ninth — have continued to recognize disparate impact claims under the ADEA." Brief in Opp., p. 14. With the Fifth Circuit's recent decision in *Smith v. City of Jackson*, __ F.3d __, 2003 WL 22671061 (CA5 Nov. 13, 2003), five circuits have declined to recognize such claims. EDS nonetheless claims that the 5-3 circuit split does not present an important issue for this Court because the pro-disparate impact circuits have not "analyzed *anew* whether such claims are properly recognized" after *Hazen Paper*. Brief in Opp., p. 14 (emphasis added). The company concedes, however, that those

circuits have "chosen" to follow their pre-*Hazen Paper* precedent. *Ibid.* There is no need for further analysis where a circuit court is not breaking from its established precedent,[1] and the Second, the Eighth, and the Ninth circuits have elected to adhere to their precedent. With the passing of the ten-year anniversary of *Hazen Paper*, it is clear that the circuit conflict is not going to be resolved until this Court intervenes.

## III. THE COURT OF APPEALS' RULING UNDERSCORES THE NEED FOR REVIEW.

The petition briefly explains why the Eleventh Circuit's decision is erroneous. Pet., pp. 14-19. EDS responds that the decision is correct. Brief in Opp., pp. 16-27. The petition and the response reveal the parties' drastically different understandings of the law. If the Court grants review, there will be time enough to reply to EDS's arguments in detail. For present purposes, however, the depth of the parties' disagreement on the merits—which mirrors

[1] This is precisely why the Eleventh Circuit's opinion is unpublished in this case. Pet., pp. 2a-3a.

the deep division among the circuits—only underscores the need for review.

Respectfully submitted,

JOHN G. CRABTREE
*Counsel of Record*

JOHN G. CRABTREE, P.A.
240 Crandon Boulevard
Suite 279
Key Biscayne, Florida 33149
Telephone (305) 423-4350

*Counsel for Petitioner*

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